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No. 84-880

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

SHAMROCK FOODS COMPANY,
*Petitioner,*

*vs.*

STATE OF ARIZONA, *et al.*,
*Respondents.*

*ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF IN OPPOSITION

J. MICHAEL HENNIGAN
GREENBERG, HENNIGAN & MERCER
450 North Roxbury Drive
8th Floor
Beverly Hills, California 90210
(213) 859-7511

RONALD LOVITT
LOVITT & HANNAN
Agriculture Building
Embarcadero at Mission Street
San Francisco, California 94105
(415) 362-8769

WINTON D. WOODS, JR.
727 North Olsen
Tucson, Arizona 85719
(602) 623-5052

KENNETH R. REED
*Counsel of Record*
KENNETH D. NYMAN
REED, GOLDSTEIN &
JENKINS-REED, P.C.
114 West Adams, Suite 760
Phoenix, Arizona 85003
(602) 254-1973

ROBERT K. CORBIN
*Attorney General*
ALISON B. SWAN
*Chief Counsel*
Antitrust Division
Department of Law Building
1275 West Washington, Room 120
Phoenix, Arizona 85007
(602) 255-4751

*Counsel for Respondents*

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## QUESTION PRESENTED

Where the plaintiff consumers have proved that defendant dairy Shamrock Foods Company conspired with grocery stores to fix the retail prices of dairy products sold both in grocery stores and through home delivery, and where all parties agree that there were no wholesale overcharges and that any consumer injury resulted solely from retail overcharges, is Shamrock entitled to partial summary judgment on the consumers' damage claims for retail overcharges in purchases of dairy products from grocery stores either because of Shamrock's settlement with certain grocery stores or because of *Illinois v. Illinois Brick Co.*, 431 U.S. 720 (1977)?

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## BRIEF IN OPPOSITION

## STATEMENT OF THE CASE

Petitioner's statement of the case contains material omissions and misstatements. Moreover, this case is here on petitioner's motion for summary judgment so all of the disputed issues of material fact must be viewed in the light most favorable to respondents. *E.g., Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). Accordingly, it is necessary for respondents to present their own statement of the case.

Respondents brought these actions individually and as representatives of a class of Arizona consumers seeking damages and injunctive relief for a conspiracy between petitioner Shamrock Foods Co. and others to fix the retail prices of dairy products sold in Arizona in grocery stores

and through home-delivery in violation of section 1 of the Sherman Act, 15 U.S.C. § 1, and Arizona law including Ariz. Rev. Stat. Ann. § 44-1402.[1] The original defendants included petitioner and three other dairies. Another dairy and ten major grocery stores doing business in Arizona were later added as defendants. Additional class actions were brought by other plaintiffs; the District Court consolidated all related actions for pretrial proceedings; and the Court eventually certified statewide classes of consumers, grocery stores, hospitals, restaurants and governmental entities pursuant to Rule 23, Federal Rules of Civil Procedure. *In re Arizona Dairy Products Litigation,* 1975-2 CCH Trade Cas. ¶ 60,395 (D. Ariz. 1975).

During the period covered by the complaints, petitioner Shamrock was both the largest wholesaler and the largest retailer of dairy products in Arizona. *See Arizona v. Shamrock Foods Co.,* 729 F.2d 1208, 1210 (9th Cir. 1984). "When the grocery store prices fell too low, Shamrock and the other dairy defendants lost home delivery sales to the grocery stores." *Ibid.* When confronted with such price-cutting, "the dairy producers held meetings to discuss retail prices and regularly had communications with grocery stores with the purpose of acting as a go-between to give assurances that a price increase by one retailer would be met by competing retailers."[2]

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[1] When originally filed in 1974, respondents' theory was based on a pass-on of wholesale overcharges which was actionable under the then-applicable Ninth Circuit law. *Compare In re Western Liquid Asphalt Cases,* 487 F.2d 191 (9th Cir. 1973), *cert. denied sub nom. Standard Oil Co. v. Alaska,* 415 U.S. 919 (1974), *with Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977). "[I]n response to advanced discovery and to the change in the law brought about by *Illinois Brick,*" respondents' theory evolved to the point that it is now based on direct retail overcharges resulting from a horizontal conspiracy to fix the prices for dairy products sold by home-delivery and in grocery stores. *Arizona v. Shamrock Foods Co.,* 729 F.2d 1208, 1215 (9th Cir. 1984).

[2] 729 F.2d, at 1211. The testimony of petitioner Shamrock's president Norman McClelland is illustrative of these efforts by the defendant dairies:

The three original defendants other than Shamrock eventually reached a settlement with the five certified

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> We would find ourselves in the middle of one retailer saying to another retailer, through us, and then back through another dairy company, that they were going to do something [to move retail prices back up to prior levels] and why didn't we pass that information on, which we did.
>
> Q. And you would pass that to your other retail customers? A. Yes.
>
> . . . .
>
> Q. And they would in turn pass it to the other milk processors? A. I think that on occasion they would pass it to a milk processor or pass it to another retail customer.
>
> . . . .
>
> Q. In the course of those communications was it typically understood what the timing of the price increases would be? A. The typical situation that we would be involved in is one of our major customers would say, "I'm not going to raise my price until John Jones raises his." That would be a kind of communication.
>
> And another kind of communication would be, "I'm going to raise my price next Monday morning, and if John Jones or the industry isn't up by Tuesday morning at 9:00 o'clock I'm going to go back down." That's the kind of information we were given.
>
> Q. And that's the kind of information that you would transmit to your other retail accounts? A. Yes.

(C.R. 746, at 7-8 *quoting* C.R. 177, at 76-79) Leo Page, owner of the Olsen Dairy and two grocery stores, described Shamrock's price stabilization efforts from the perspective of a grocery store:

> Q. In the months shortly after you acquired Olsen Dairy in 1965, were you visited by William J. Parker of Shamrock? A. Oh, yes.
>
> Q. What did he come to tell you, if anything? A. Oh, basically just talk about our retail prices of milk.
>
> Q. What did he have to say about your retail prices? A. Oh, just basically keep them up higher than they were, get them up higher than they were.
>
> Q. When you say your "retail prices," do you mean the prices of your retail customers? A. Well, we operate two stores and sell retail from those two stores and these are what would be considered.

classes. 729 F.2d, at 1210. Shamrock then settled with all but the consumer class. *Ibid.* All of these settlements and the separate interclass allocation agreement expressly reserved the consumers' claims against Shamrock.[3]

Petitioner Shamrock then moved for "partial summary judgment dismissing all claims . . . for damages from purchases of milk and other dairy products made by [consumers] through grocery stores." (C.R. 738, 742) Interestingly, Shamrock did not seek dismissal of the claims for damages arising from its own home-delivery sales. Pet. at 2 n.2. The District Court granted Shamrock's motion, reasoning that the consumer class was estopped from asserting a horizontal conspiracy between the dairies and the grocery stores (C.R. 753 at 3-4) and that *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977), barred the consumers' claims. The District Court did certify its decision for immediate interlocutory appeal pursuant to Rule 54(b), Federal Rules of Civil Procedure, however.

On appeal, the Ninth Circuit unanimously reversed. The Court held that there was ample evidence to establish a conspiracy between the dairies and the grocery stores to fix the retail prices of dairy products sold in grocery stores and through home-delivery. (729 F.2d, at 1210-11; *see also* note 2, *supra*) Following the decisions of every other Circuit Court of Appeals and District Court which had considered

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> Q. Did you understand him to be referring only to the retail operations of those two stores or also to the retail prices of your retail customers? A. Oh, I suppose he had reference to the others, but basically these two are the ones he was most concerned with.

(C.R. 757, at 21-22, *quoting* Deposition of Leo Page, June 12, 1978, at 7-8)

[3] C.R. 341 at 9-10, 344 at 1, 509 at 7-8 and 578 at 7. Shamrock's petition repeatedly claims that respondents' share of the settlement with the other defendants was based on "their affirmation to the district court that the grocery stores had merely passed on allegedly fixed wholesale overcharges to them." (Pet. at 3) With all due respect, Shamrock's argument materially misstates the record in the District Court. "A significant factor underlying the settlement negotiations was the allegation of a conspiracy between the defendants in this litigation and members of the Grocery Store Class." (C.R. (74-571) 44 at 6-7)

the issue (*see id.*, at 1212-13), the Court held that claims based on a horizontal conspiracy between competitors were not barred by *Illinois Brick*. The Court also held that there was no factual or legal basis for estopping the consumers from asserting their horizontal price-fixing claims.[4] Shamrock's petition for rehearing was denied and its suggestion of a rehearing *en banc* was rejected.

## REASONS FOR DENYING THE WRIT

### I. THE NINTH CIRCUIT'S DECISION RESTS ON THE RESOLUTION OF DISPUTED ISSUES OF MATERIAL FACT

To be successful on its motion for partial summary judgment, petitioner must "show that there is no genuine issue as to any material fact and that [it] is entitled to a judgment as a matter of law." Rule 56(c), Federal Rules of Civil Procedure. The Ninth Circuit reversed the District Court's decision because it found that respondents had presented competent evidence to prove that Shamrock participated in a horizontal conspiracy to fix the retail prices it and other dairies charged their home-delivery customers and that grocery stores charged their customers.

In its petition, Shamrock attempts to give a different characterization to the evidence. It argues, for example, that "[e]vidence of a vertical conspiracy was . . . present from the very beginning" (Pet. at 4), but totally ignores the characterization of the available evidence which would tend to

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[4] The Ninth Circuit rejected petitioner's estoppel argument reasoning that the "theories advanced by the consumers do not necessarily conflict" and were simply "in response to advanced discovery and to the change in the law brought about by *Illinois Brick*." 729 F.2d, at 1215. Although petitioner baldly asserts that the decision below is "[i]n conflict with the other circuits which have considered the problem" (Pet. at 14), petitioner does not even identify any of those decisions which allegedly create the conflict. Petitioner does not claim that the Ninth Circuit's decision conflicts with any decision of this Court or otherwise provides any other basis for review by way of a writ of certiorari. *See* Rule 17, Rules of the Supreme Court of the United States.

establish a horizontal price-fixing conspiracy. Shamrock's argument is based on nothing more than its own characterization of the allegations and evidence. This is something that Shamrock should save for closing statements to the jury and certainly is not an appropriate basis for it to seek summary judgment or a writ of certiorari. Since this case involves nothing more than the parties' conflicting interpretation of the allegations of the complaints and the available evidence, it is inappropriate for this Court to review on a petition for a writ of certiorari. *See, e.g., United States v. Johnston*, 268 U.S. 220, 227 (1925)("We do not grant a certiorari to review evidence and discuss specific facts.").

## II. THERE IS NO CONFLICT BETWEEN THE NINTH CIRCUIT'S DECISION AND THE DECISIONS EITHER OF OTHER CIRCUITS OR OF THIS COURT

Petitioner does not even attempt to argue that the Ninth Circuit's decision interpreting *Illinois Brick* conflicts in any way with any decision of any other Circuit Court of Appeals or of any District Court. Any such argument would be foreclosed by the Ninth Circuit's own opinion which indicated that it was following the decisions of every other federal court which had considered the question. (*See* 729 F.2d, at 1212-13) Since there is unanimity among the lower federal courts on the interpretation of this Court's *Illinois Brick* decision, there is no need to issue the writ.

Petitioner does argue that the Ninth Circuit decision conflicts with this Court's opinion in *Illinois Brick* but that argument is without merit. In *Illinois Brick*, this Court held that an antitrust plaintiff could not utilize "offensive pass-on" to recover damages resulting from a price-fixing conspiracy occurring at a level of the chain of distribution remote from the one at which the plaintiff purchased. *Cf. Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1969) (antitrust defendant prohibited from utilizing "defensive pass-on"). The Ninth Circuit correctly held that *Illinois Brick* was inapplicable here because there was no reliance upon offensive pass-on, because the consumers

purchased directly from the alleged price-fixers, because there was no potential for duplicative recovery for retail overcharges and because the consumers' damage theory was based entirely upon retail overcharges. 729 F.2d, at 1212-13. Petitioner's argument at best ignores and at worst mischaracterizes the Ninth Circuit's decision and thus fails to establish any conflict with this Court's decision in *Illinois Brick*.

## III. THE NINTH CIRCUIT'S DECISION RESTS ON ADEQUATE STATE GROUNDS

Respondents' claims were based not only on section 1 of the Sherman Act, 15 U.S.C. § 1, but also on Arizona law including Ariz. Rev. Stat. Ann. § 44-1402. *See* Pet. at 2. The District Court's summary judgment dismissed both the state and federal claims for relief and the Ninth Circuit's mandate reversed this judgment in its entirety and reinstated both the state and federal claims. Thus, even if this Court were to issue the writ and consider the Ninth Circuit's interpretation of federal law, there would still be an adequate state ground supporting the Ninth Circuit's decision. Petitioner makes no argument that the Ninth Circuit's opinion conflicts in any way with any decision by any Arizona state court. In these circumstances, there is an adequate state ground supporting the Ninth Circuit's decision and the petition for a writ of certiorari should be denied. *See* Rule 17, Rules of the Supreme Court of the United States.

## CONCLUSION

The petition for writ of certiorari should be denied.

KENNETH R. REED
*Counsel of Record*
KENNETH D. NYMAN
REED, GOLDSTEIN &
JENKINS-REED, P.C.
114 West Adams, Suite 760
Phoenix, Arizona 85003

J. MICHAEL HENNIGAN
GREENBERG, HENNIGAN
& MERCER
450 North Roxbury Drive
8th Floor
Beverly Hills, California 90210

RONALD LOVITT
LOVITT & HANNAN
Agriculture Building
Embarcadero at Mission Street
San Francisco, California 94105

WINTON D. WOODS, JR.
727 North Olsen
Tucson, Arizona 85719

ROBERT K. CORBIN
Attorney General
ALISON B. SWAN
Chief Counsel
Antitrust Division
1275 West Washington, Room 120
Phoenix, Arizona 85007
By _____
KENNETH R. REED

Counsel for Respondents